

**Comments on the preparation of draft guidelines
on the effective implementation of the right to participate in public affairs
by the secretariat to the Aarhus Convention**

The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (commonly known as the “Aarhus Convention”) is a legally binding international treaty with 47 Parties to date. Negotiated under the auspices of the UNECE, the Aarhus Convention is open globally for accession by any UN Member State.

While the Aarhus Convention specifically concerns the right to participate in decision-making in environmental matters, the underlying principles are also applicable to public participation in other contexts. The following input should be read in this light.

(1) Scope and definitions

In order to operationalize a right to participate in public affairs, it is of central importance to have clear definitions of: (a) the right holders, (b) the duty holder and (c) public affairs.

The right holders

The draft guidelines should make clear that the right to participate in public affairs is held by all members of the public, meaning one or more natural or legal persons and their associations, organizations and groups.¹ In addition, the guidelines should expressly provide that the right to participate is afforded to every individual without discrimination (see further point 2 below on non-discrimination). Secondly, the guidelines should call on States to provide for appropriate recognition of and support to associations, organizations or groups promoting the right to participate in public affairs and to ensure that its national legal system is consistent with this obligation.²

The duty holder

As with all human rights, the primary duty holder is the State and the right to participate in public affairs must therefore be ensured by all organs of the State. In this regard, “organs of the State” should be defined to include government at national, regional or other level.³ It should also be defined to include any natural or legal person performing public functions, public responsibilities or public services under the control of an organ of the State.⁴ The guidelines should also make clear, however, that while it may be acceptable to engage private entities (such as consultants, non-governmental organizations etc.), to arrange and facilitate certain aspect of the right to participate in public affairs, the final responsibility to ensure this right always rests with the State itself.

Public affairs

In the guidelines, “public affairs” should be given a broad definition in order to make the right to participate as effective as possible in practice. In addition to the fundamental aspects of representative democracy (such as participation in elections), public affairs should include the preparation, formulation and adoption of laws, regulations, plans, programmes, policies and decisions on specific actions or activities⁵ by organs of the State (as defined above).

¹ See Aarhus Convention, article 2(4).

² See Aarhus Convention, article 3(4).

³ See Aarhus Convention, article 2(2)(a).

⁴ See Aarhus Convention, article 2(2)(b) and (c).

⁵ See Aarhus Convention, articles 6, 7 and 8.

(2) Non-discrimination

The importance of the right to non-discrimination to the fulfilment of the right to participate in public affairs is recognized in paragraph 6 (c), (d) and (e) of Resolution 33/22 and should be expressly reflected in the draft guidelines.

One important aspect of non-discrimination in the right to participate is that proactive measures must be taken to facilitate the participation of all parts of society. States should pay special attention to assist and provide guidance to the public, including specifically targeted assistance to those in vulnerable situations.⁶ This includes, for instance:

- Education and awareness-raising for the public at large and specifically targeted at vulnerable groups;⁷
- Equal access to participatory processes to persons regardless of citizenship, nationality or domicile and in the case of legal persons (such as NGOs), without discrimination as to where they have their registered seat or effective centre of their activities;⁸
- Special measures to facilitate the participation of minorities and especially vulnerable groups, for example:
 - Measures to actively promote participation of women, including special temporary measures;
 - Special participatory frameworks for children, such as children's hearings, children's parliaments, children-led organizations, children's unions or other representative bodies, discussions at school, social networking websites etc;⁹
 - Recognition of special rights of indigenous communities, such as prior and informed consent.¹⁰

(3) Safe and enabling environment for human rights defenders

In order to ensure the right to participate in public affairs, it is of central importance that persons and organizations exercising their right to participation are not persecuted, penalized or harassed for their involvement.¹¹ The importance of this aspect of the right to participate is already reflected in paragraph 6 (j) of Resolution 33/22. In order to realize a safe and enabling environment, the connection to the right to free association and assembly should be recognized. This includes protection against undue identity checks, prevention of the use of excessive force by police officers and private security forces and protection against actions by private actors aimed at inhibiting participation. It further requires proactive steps to support those at risk, to prevent interferences with their rights and end impunity for violations.¹²

⁶ UNECE Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters (Maastricht Recommendations on Promoting Effective Public Participation), available at <http://www.unece.org/index.php?id=41803>, para. 20(e).

⁷ Aarhus Convention, article 3(2).

⁸ Aarhus Convention, article 3(9).

⁹ See for instance, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (A/HRC/37/58), paras. 47-50.

¹⁰ UN Declaration on the Rights of Indigenous People, article 10.

¹¹ Aarhus Convention, article 3(8).

¹² See also para. 7 of the 2016 Resolution on Civil Society Space (A/HRC/32/L.29).

(4) Central aspects of effective public participation

The Aarhus Convention contains a number of rather detailed requirements on how to ensure effective public participation in decision-making. The now considerable experience gained in implementing these requirements has shown that if any one of the following elements are missing, effective public participation cannot take place. Bearing in mind the required brevity of the present comments, the fundamental elements for ensuring effective public participation are summarized below to their most essential components:

a) Identification and notification of the public concerned

An essential first step to enabling the public to effectively participate in public affairs is to identify and notify all those members of the public who may be affected or likely to be affected by, or having an interest in, the decision-making (“the public concerned”).¹³ The draft guidelines should make clear that the process of identification should however not prevent persons other than those identified from participating if they so wish.¹⁴ Moreover, for certain decisions, e.g. decisions with country-wide or very wide-spread impact, all members of the public should be identified as potentially affected.¹⁵

The public concerned should be notified early in the decision-making procedure, and in an adequate, timely and effective manner, of the nature of the decision and the public’s opportunities to participate in the decision-making.¹⁶ This means concretely that members of the public should be informed in a locally appropriate manner, be it by notices in local print media, mass media (TV, radio), online sources, site notices, posters or billboards in areas frequented by the local population etc.¹⁷ In some cases, individual notification may be appropriate.¹⁸ The notice itself should contain sufficient information for the public to understand what is at stake, what the steps of the decision-making procedure will be and how and when they can get engaged.¹⁹

b) Reasonable timeframes for the public to participate

In order for the public to be able to effectively exercise their right to participate, it is essential that reasonable timeframes be provided for notifying and informing the public and to allow the public to prepare and participate effectively.²⁰ The respective timeframes should be adjusted depending on the

¹³ See Aarhus Convention, article 6(2), and the findings of the Aarhus Convention Compliance Committee on communication ACCC/C/2013/91 (United Kingdom), ECE/MP.PP/C.1/2017/14, para. 78. Our suggested definition of the “public concerned” accords with that used in article 2(5) of the Aarhus Convention and the Bali Guidelines for Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental matters (Bali Guidelines). The Bali Guidelines are available at http://staging.unep.org/civil-society/Portals/24105/documents/Guidelines/GUIDELINES_TO_ACCESS_TO_ENV_INFO_2.pdf.

¹⁴ Aarhus Convention, article 6(7), and Maastricht Recommendations on Promoting Effective Public Participation, para. 108.

¹⁵ This may be relevant for instance to public participation on plans and programmes (see Aarhus Convention, article 7, and *The Aarhus Convention: An Implementation Guide* (second edition, 2014), pp. 179-180, available at: https://www.unece.org/env/pp/implementation_guide.html) or public participation on executive regulations or generally applicable legally binding normative instruments (see Aarhus Convention, article 8 (c) and *The Aarhus Convention: An Implementation Guide*, p. 184) as well as public participation on specific activities.

¹⁶ Bali Guidelines, guideline 8, and Aarhus Convention, article 6(2).

¹⁷ See *The Aarhus Convention: An Implementation Guide*, pp.134-136 and the findings of the Aarhus Convention Compliance Committee on communication ACCC/C/2006/16 (Lithuania), ECE/MP.PP/2008/5/Add.6, para. 67 as well as the findings of the Compliance Committee on communication ACCC/C/2009/43 (Armenia), ECE/MP.PP/2011/11/Add.1, para. 70, for the requirements of effective notice.

¹⁸ See *The Aarhus Convention: An Implementation Guide*, p. 135.

¹⁹ See Aarhus Convention, article 6(2)(a)-(vi) for the requirements on the content of public notice for decision-making on specific activities.

²⁰ Aarhus Convention, article 6(3), article 7 and article 8(a).

specific circumstances, e.g. in accordance with the complexity of the issue at stake or the number of people that may be affected by the decision.²¹ Attention should also be paid to ensure that the public's opportunities to participate do not exclusively or to a large part fall into periods of public life traditionally considered as holidays, such as major religious festivals, national holidays or major vacation periods in the State concerned.²²

c) Providing for public participation when all options are open

A fundamental element of effective public participation is that the public must be entitled to participate at a stage when all options are actually still open.²³ This entails firstly that no formal decisions that would foreclose options have been taken prior to the commencement of the public participation procedure. It also requires that no steps have been taken that would undermine public participation in practice, such as already having made large investments in the direction of one option, having taken actions "on the ground" that would effectively foreclose other options or having entered into an agreement agreeing a certain outcome with another organ of the State, a private company or another State.²⁴

d) Provide access to all information relevant to the decision-making

In order to be able to participate effectively, the public must be provided with all information relevant to the decision-making process available at the time of the participation procedure.²⁵ The right to participate in public affairs is therefore closely interlinked and dependent upon the effective realization of the right of access to information. The relevant information should be disseminated proactively by making it available in a manner appropriate to local conditions. In this regard, the relevant information should be made available free of charge both in physical form and, wherever possible, by publishing it over the internet.²⁶ Furthermore, the State should ensure that suitable mechanisms are in place to enable the public to request further information and to receive the requested information early enough in the participation procedure so that they can use it to prepare their input (see also point (b) above).²⁷

Attention must be paid to provide both technical information for experts and non-technical summaries that are understandable by laypersons.²⁸ Information must further be disclosed in local, including minority, languages and taking account of the special needs of particularly vulnerable groups (see also section (2) on non-discrimination above).²⁹

In addition, the proactive dissemination on a continuing basis of relevant information on public affairs, such as through e-Government and open data initiatives, is an important aspect of transparent governance and of supporting the public's informed participation in public affairs.³⁰

²¹ *The Aarhus Convention: An Implementation Guide*, p. 143 and the findings of the Compliance Committee on communication ACCC/C/2009/37 (Belarus), ECE/MP.PP/2011/11/Add.2, paras. 89-90.

²² *The Aarhus Convention: An Implementation Guide*, p. 144 and the findings of the Compliance Committee on communication ACCC/C/2008/24 (Spain), ECE/MP.PP/C.1/2009/8/Add.1, para. 92.

²³ Aarhus Convention, article 6(4).

²⁴ *The Aarhus Convention: An Implementation Guide*, p. 144, and the findings of the Compliance Committee on communications ACCC/C/2007/22 (France), ECE/MP.PP/C.1/2009/4/Add.1, paras. 38-39 and ACCC/C/2008/24 (Spain), ECE/MP.PP/C.1/2009/8/Add.1, para. 119 (c).

²⁵ Bali Guidelines, guideline 10, and Aarhus Convention, article 6(6), article 7 and article 8(b).

²⁶ *Ibid.* and *The Aarhus Convention: An Implementation Guide*, pp. 148, 178 and 183.

²⁷ This links to the requirement of the right to access to information. See Aarhus Convention, article 4.

²⁸ See Aarhus Convention, article 6, paragraph 6 (a)-(f); *The Aarhus Convention: An Implementation Guide*, p. 152, and Maastricht Recommendations on Promoting Effective Public Participation, paras. 94-96.

²⁹ Maastricht Recommendations on Promoting Effective Public Participation, para. 94(b).

³⁰ Aarhus Convention, article 5 (regarding active dissemination of information), and the Budva Declaration on Environmental Democracy for Our Sustainable Future, ECE/MP.PP/2017/16/Add.1, para. 12 (on open data).

e) Opportunity for the public to submit comments

The public should have the possibility to submit any information, analyses and opinions that it considers relevant to the decision-making (i.e. it is for the public, not the decision-maker to decide what is relevant).³¹ Moreover, the public should be entitled to submit its comments directly to the competent organ of the State.³² Attention must be paid to ensure that the opportunities for the public to provide comments are easily accessible, free of charge and without excessive formalities.³³ In addition to the possibility to submit written comments (either electronically or in paper form), in-person consultations such as community meetings, roundtables and public hearings are important tools through which the public may ask questions as well as provide their views on the proposed activity. When deciding whether or not to hold a formal public hearing, the following factors may be borne in mind:

- a. The scale of the proposed activity and/or its potential impact;
- b. The size of the affected population;
- c. The controversial or high profile nature of the activity, recognizing, however, that this often may not be known until the public has had an opportunity to present its views;
- d. A need to investigate witnesses or to provide an opportunity for the public to be heard;
- e. A need to provide for cross-examination or the airing of conflicting views;
- f. Requests from the public concerned for a hearing or inquiry to be held.³⁴

Depending on local circumstances and the decision concerned, in-person consultations may be supplemented or even replaced with online consultations.

f) Taking due account of the public participation

The outcome of the public participation must be taken into due account by the competent organ of the State.³⁵ This requires that adequate time is allocated between the end of the participation phase and the taking of the final decision.³⁶ In order to provide evidence of how participation was taken into account, either the decision itself or an accompanying document, published together with the decision, should explain how the public participation was indeed taken into account.³⁷ As a good practice, a table or list can be provided that gives an overview of the comments received from the public and how they have been addressed in the decision taken, or if not, why not.³⁸

g) Informing the public of the decision taken and the reasons and considerations on which it is based

After the decision has been taken, the public should be promptly informed of the decision taken, including the reasons and considerations on which it is based.³⁹ These reasons and considerations should include a summary of how the outcome of the public participation has been taken into account (see (f) above). This is particularly important in order that the public can see how their comments have been taken into account and also to enable the public to have the necessary information to challenge the

³¹ Aarhus Convention, article 6(7) and Maastricht Recommendations on Promoting Effective Public Participation, para. 109.

³² Aarhus Convention, article 6(7), article 7 and article 8(c).

³³ Maastricht Recommendations on Promoting Effective Public Participation, para. 108.

³⁴ Maastricht Recommendations on Promoting Effective Public Participation, para. 116.

³⁵ Bali Guidelines, guideline 11, and Aarhus Convention, article 6(8), article 7 and article 8.

³⁶ Findings of the Compliance Committee on submission ACCC/S/2004/1 and communication ACCC/C/2004/3 (Ukraine), para. 29.

³⁷ Findings of the Compliance Committee on communication ACCC/C/2008/24 (Spain), ECE/MP.PP/C.1/2009/8/Add.1, para. 100.

³⁸ *The Aarhus Convention: An Implementation Guide*, p. 156.

³⁹ Bali Guidelines, guideline 11, and Aarhus Convention, article 6(9).

decision if it wishes to do so.⁴⁰ In order to facilitate the latter, information on available review mechanisms should also be provided with the decision.⁴¹

h) Access to a review procedure

As recognized in paragraph 6 (k) of Resolution 33/22, citizens whose right to participate in public affairs has been violated must be given access to justice and redress mechanisms.⁴² Access to justice implies access to a court of law and/or another independent and impartial body established by law with the power to give adequate and effective remedies. This right should be granted not only to members of the public but also to non-governmental associations.⁴³ In order to provide adequate and effective remedies, review procedures must be fair, equitable, timely and not prohibitively expensive.⁴⁴ Moreover, injunctive relief and legal aid should be provided as appropriate.⁴⁵

(5) Right to participate in international processes

Finally, in accordance with paragraph 10 (b) of Resolution 33/22, the above general principles should also be applied at the international level, in particular in the context of international decision-making processes and in the framework of international organizations.⁴⁶ The right to participate at the international level requires that access to information and public participation is ensured both in the procedures of international forums and also in the substantive outputs of the forums.⁴⁷ With respect to the right to participate in the procedures of international forums, the draft guidelines should make clear that this right extends to all meetings of international forums, including their subsidiary bodies and other groups established by the forums to contribute to the decision-making.⁴⁸ The right to participate in meetings of international forums may be assured by granting observer status to members of the public and NGOs, by opening advisory committees and forums and dialogues to members of the public and NGOs and by arranging for webcasting of events, as well as through inviting comments from the public on draft documents and other substantive outputs of the international forum.⁴⁹ In this regard, the *Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums* may serve as a source of inspiration and guidance on how to promote access to information and public participation within international decision-making processes.⁵⁰

⁴⁰ *Maastricht Recommendations on Promoting Effective Public Participation*, paras. 130 and 132.

⁴¹ *The Aarhus Convention: An Implementation Guide*, p. 157.

⁴² Bali Guidelines, guideline 16, and Aarhus Convention, article 9(2).

⁴³ *The Aarhus Convention: An Implementation Guide*, p. 195 and findings of the Compliance Committee on communication ACCC/C/2005/11 (Belgium), ECE/MP.PP/C.1/2006/4/Add.2, paras. 35-36.

⁴⁴ Bali Guidelines, guidelines 19 and 20, and Aarhus Convention, article 9, paragraph 4.

⁴⁵ Bali Guidelines, guidelines 20 and 21, and Aarhus Convention, article 9, paragraphs 4 and 5.

⁴⁶ Aarhus Convention, article 3(7).

⁴⁷ Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums, ECE/MP.PP/2005/2/Add.5, para. 2, available from <https://www.unece.org/index.php?id=21464>.

⁴⁸ *Ibid*, para. 29.

⁴⁹ *Ibid*, para. 33.

⁵⁰ Available from <https://www.unece.org/index.php?id=21464>.